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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SAUL VALLIN, Defendant and Appellant.	B213072 (Los Angeles County Super. Ct. No. NA078811)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Reversed in part, affirmed in part with modifications.

So'Hum Law Center of Richard J. Moller and Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Patterson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Saul Vallin, appeals from his convictions for two counts of first degree burglary (Pen. Code,[1] § 459) and two counts of theft (§ 484, subd. (a)) and the special finding that a person was present during one of the burglaries. (§ 667.5, subd. (c)(21).) Defendant argues: there was insufficient evidence to support two separate first degree burglary convictions and the finding that the victim was present in the residence; the prosecutor committed misconduct; and, if the prosecutorial issue has been forfeited, defense counsel failed to provide effective representation. We reverse the special finding that the victim in count 1 was present within the meaning of section 667.5, subdivision (c)(21) during the burglary, modify defendant's presentence credits and otherwise affirm the judgment.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Viktor Haritonoff and Seth Buchwald lived in separate apartments at the Palace Lofts building at 278 Alamitos in Long Beach on June 25, 2008. The building had 18 lofts and a common secured front door. Only residents and delivery persons were allowed entry to the building. A call box allowed entry by way of entering a code or calling a resident. There is also a seldom used locked back door entrance to the building. The rear door could only be opened with a key. Mr. Haritonoff was present in his apartment all day.

A United Parcel Service employee left packages outside the apartment doors of both Mr. Haritonoff and Mr. Buchwald on June 25, 2008. At approximately 3 p.m., a neighbor, identified only as "Xavier," notified Mr. Haritonoff that some boxes had been

[1] All further statutory references are to the Penal Code unless otherwise indicated.

opened. Mr. Haritonoff had ordered some Adidas clothing. Mr. Haritonoff's name and address were on the box. However, the clothing was missing. The neighbor identified only as Xavier and Mr. Haritonoff went to the laundry next door to the building. Mr. Haritonoff saw defendant in the laundry. Mr. Haritonoff also saw his Adidas shorts on top of the washing machine. The washing machine was a few feet away from defendant. Mr. Haritonoff said: "Hey, . . . these are my packages, and it's my stuff. What are you doing?" Defendant, who appeared very nervous, said he thought the building was some kind of museum. Defendant said he was curious and was not sure why he took the shorts. When asked about the other package, defendant said he had taken it to his home but would go to his house and get it if they let him go. Mr. Haritonoff did not see a paintball gun with defendant. Mr. Haritonoff called the police. Mr. Buchwald's package contained a paintball gun valued at approximately $125. The package measured three feet by three feet. However, when Mr. Buchwald returned home the following day, he found the package open and the paintball gun missing. Neither Mr. Haritonoff nor Mr. Buchwald had given anyone, including defendant, permission to go into the apartment building and remove anything.

Long Beach Police Officer Ralph Robbins arrived at the laundromat. Officer Robbins spoke to the neighbor identified only as Xavier and Mr. Haritonoff about what had occurred. Defendant was advised of his constitutional rights. Defendant acknowledged that he understood his rights. Defendant agreed to talk to Officer Robbins. When asked if he had been in the apartment building at 278 Alamitos, defendant said he had seen some packages inside the building. Defendant said he wanted what was in the packages and took them. Defendant said he took some of the items home and came back to get more from the apartment building. When asked how he got inside the apartment building, defendant said he "better not" explain that. Defendant indicated he did not know anyone in the apartment. Defendant said he took what he thought was a computer the first time he was inside the building. Defendant did not say anything about thinking the apartment building was a museum.

Defendant testified on his own behalf. Defendant stated that while waiting for his laundry to finish, he entered an open door at the adjacent building. Defendant thought it was a museum where he had once been an intern. Defendant saw the boxes in the hallway. Defendant thought the boxes might contain art. Defendant opened the larger box, where he found a paintball gun. Thereafter, defendant grabbed a clear bag containing the Adidas shorts. Defendant said he put the box containing the paintball gun near the bench in the laundromat. Defendant placed the shorts on top of the washer. When confronted by the neighbor identified only as Xavier and Mr. Haritonoff, defendant was asked about a computer. Defendant responded, "What computer?" Defendant told the two men that the paintball gun was "by the bench" and the clothing was "on top of the washer."

III. DISCUSSION

A. Sufficiency of the Evidence

1. Separate entries to the apartment building

Defendant argues there was insufficient evidence that he made two separate entries to support his convictions for two burglaries. Defendant admitted taking the items in question at trial and on appeal. Relying on the corpus delecti rule, defendant argues there was insufficient evidence to support two burglary convictions. He reasons there was insufficient evidence, apart from his pretrial admissions, that he entered the apartment building. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hovarter* (2008) 44

Cal.4th 983, 996-997; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Section 459 defines burglary, "Every person who enters any house, room, apartment . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." Defendant argues that the corpus delicti rule prevents the use of his statements to police alone to convict him of two separate burglaries. Each entry constitutes a separate offense. (*People v. Washington* (1996) 50 Cal.App.4th 568, 574-579; see *People v. Elsey* (2000) 81 Cal.App.4th 948, 956-957.) Thus, defendant argues there is insufficient evidenced to demonstrate he made two entries.

Our Supreme Court has described the corpus delicti rule thusly: "In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e. , the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169; e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 404.) The corpus delicti rule requiring some independent proof of the crime has roots in the common law and is not

mandated by statute nor by the federal and state Constitutions. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1169; see *People v. Hamilton* (1963) 60 Cal.2d 105, 129, overruled on another point in *People v. Morse* (1964) 60 Cal.2d 631, 649.) The corpus delicti rule requires slight evidence somebody committed a crime. (*People v. Ochoa, supra*, 19 Cal.4th at p. 450; *People v. Morales* (1989) 48 Cal.3d 527, 553.) The slight evidence necessary to sustain conviction is as follows: "Moreover, 'the modicum of necessary independent evidence of the corpus delicti, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be "a slight or prima facie showing" permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues.' (*People v. Alvarez, supra,* at p. 1181.)" (*People v. Valencia* (2008) 43 Cal.4th 268, 297.)

Here, there is slight evidence two burglaries, i.e., entries, occurred apart from defendant's statements. Two parcels were left by the United Parcel Service delivery person. The two packages were left outside the apartment doors of both Mr. Haritonoff and Mr. Buchwald. At approximately 3 p.m., Mr. Haritonoff saw that the package in front of his apartment had been opened. Missing from the package addressed to Mr. Haritonoff was some Adidas sportswear he had ordered. The person identified only as Xavier and Mr. Haritonoff went to the laundry next door to the building. Mr. Haritonoff saw defendant in the laundry. On top of the washing machine a few feet away from defendant was the sportswear Mr. Haritonoff had ordered. Defendant appeared very nervous.

Also missing was the paintball gun ordered by Mr. Buchwald. The paintball gun was not in the laundry room. Mr. Haritonoff did not see a paintball gun with defendant. The package in which the paintball gun had been delivered was large; three feet by three feet. The paintball gun was never recovered. The jury, which was instructed on the corpus delicti rule, reasonably could have concluded the size of the paintball gun, which was never was recovered, required a second trip or entry to secure Mr. Haritonoff's

sportswear which was found in the laundry room. As noted, the paintball gun was not in the laundry room and was never recovered.

2. The presence of Mr. Haritonoff in his residence during the burglary

Defendant argues that there was insufficient proof that Mr. Haritonoff was present in his apartment at the time the burglary took place in the hallway, thereby making the burglary a violent offense. (§ 667.5, subd. (c)(21).) Defendant relies on our decision in *People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336. We posited the issue thusly in *Singleton*, a case involving a burglary occurring in a secure apartment building: "The parties agree that [the victim] was not physically inside the apartment unit at the time it was burglarized. They agree he was outside the apartment itself, down the hall, around the corner, yet within the locked gate restricting access to the third story of the building. The question in this case turns on whether [the victim] was nevertheless 'present in the residence' as he stood in the outside hallway for purposes of section 667.5, subdivision (c)(21). We review the statutory interpretation issue de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)" (*People v. Singleton*, *supra*, 155 Cal.App.4th at p. 1337.)

We looked to the statutory intent of the Legislature in enacting section 667.5, subdivision (c)(21), noting: "Enacted as part of Proposition 21 in 2000, section 667.5, subdivision (c)(21) elevates a first degree burglary (§ 460) to the status of a violent felony if a person other than an accomplice is 'present in the residence' during the burglary. (*Doe v. Saenz* (2006) 140 Cal.App.4th 960, 947.)" (*People v. Singleton, supra*, 155 Cal.App.4th at p. 1336.) In *Singleton*, we held: "Section 667.5, subdivision (c)(21) is plain on its face, and it requires a person, other than an accomplice, be '*present in the residence*' during the commission of the burglary.' [] The plain meaning of 'present in the residence' is that a person, other than the burglar or an accomplice, has crossed the threshold or otherwise passed within the outer walls of the house, apartment, or other dwelling place being burglarized. 'The threshold line of the building is located at the

doorways into the apartments. One who stands on the stairway would not be considered "inside" the building under ordinary parlance.' (*People v. Wise* (1994) 25 Cal.App.4th 339, 345.) Certainly, it would not comport with the ordinary and plain usage to consider someone standing outside, around the corner, and down the hall from an apartment to be present in that apartment." We reversed the occupied burglary allegation on the grounds there was insufficient evidence that the victim was present in the apartment during the burglary. (*People v. Singleton, supra*, 155 Cal.App.4th at pp. 1339-1340.)

We again conduct substantial evidence review of the section 667.5, subdivision (c)(21) finding. (*People v. Mincey, supra*, 2 Cal.4th at p. 432, fn. omitted; *People v. Hovarter, supra*, 44 Cal.4th at pp. 996-997.) The opposite situation of that in *Singleton* is present in this case. Mr. Haritonoff was inside his apartment at the time the burglary took place. But the burglary actually took place in the hallway outside Mr. Haritonoff's apartment. Defendant entered the secure apartment building and stole Mr. Haritonoff's property from the hallway. Mr. Haritonoff was not even aware of the burglary until he was alerted by a neighbor after it occurred. Although it was defendant in the hallway rather than the victim, we conclude as we did in *Singleton,* "It would be unreasonable to find the voters understood 'present in the residence' to apply when a person was standing in the hallway, outside an apartment unit." (*People v. Singleton, supra*, 155 Cal.App.4th at p. 1339.) We therefore reverse the finding as to count 1 that the burglary was a violent felony as defined by section 667.5, subdivision (c)(21).

B. Prosecutorial Misconduct

1. Forfeiture

Defendant argues misconduct was committed when he was cross-examined. In the alternative, defendant argues that he was afforded ineffective assistance of counsel if we find the misconduct issue was forfeited. In reviewing the principles governing findings of prosecutorial misconduct the California Supreme Court has consistently noted: "'"The

applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1215, 1263, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Harris* (1989) 47 Cal.3d 1047, 1084, criticized on other grounds in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.)

Defendant did not object to the alleged instance of prosecutorial misconduct on these grounds at trial. This failure constitutes forfeiture of the issue on appeal. The California Supreme Court has held that a reviewing court will generally not review a prosecutorial misconduct claim unless an objection and request for admonishment was raised at trial, unless an admonition would not have cured the harm. (*People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1328; *People v. Benavides* (2005) 35 Cal.4th 69, 108 [defendant's failure to object to the prosecutor's alleged plea to the passions and prejudices of the jury and failure to request an admonition resulted in forfeiture of the issue on appeal]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 74; *People v. Sapp* (2003) 31 Cal.4th 240, 279.) Our Supreme Court has held, "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instruction the harmful effect upon the minds of the jury." [Citation.]' [Citation.]" (*People v. Cox* (1991) 53 Cal.3d 618, 682, quoting *People v. Green* (1980) 27 Cal.3d 1, 27, disapproved on another point in *People v. Morgan* (2007) 42 Cal.4th 593, 611.)

Defense counsel objected to some of the prosecutor's "is he lying" questions with "misstates the evidence" or "asked and answered" objections. No "argumentative,"

"speculative," "irrelevant" or "misconduct" objections were interposed. Defendant's claims of prosecutorial misconduct as to the prosecutor's references to the prosecution witnesses "lying" and alleged improper comments during closing argument have been forfeited because defense counsel failed to object on those grounds at trial.

2. Factual and procedural background

Defendant argues he was improperly cross-examined when he was asked if the prosecution witnesses were lying. The prosecutor asked, "So if Mr. Haritonoff said on the stand, which he did, that he saw the empty box outside of the apartment with nothing inside, he would be lying?" Defendant responded, "I don't know if he was lying. . . . I just seen a box, and there was a paintball . . . gun in the box, and I took the box, and the box was in the laundromat." Thereafter, the prosecutor inquired, "And if Mr. Haritonoff, as he stated on the stand, said that he did not see you with the paintball gun, in fact, he checked the wastebasket and did not find anything, and that you did not offer him a box with the paintball gun, he would be lying?" Defendant responded: "I wasn't even talking to [Mr. Haritonoff] though actually. I was talking to Xavier or whatever, you know. I told him." The prosecutor then asked, "But if [Mr. Haritonoff] had said those things, he would be lying?" Defense counsel's asked and answered objection was overruled. Defendant responded: "I don't know what to tell you. I really don't so I'm not going to answer." When asked if he remembered admitting that he took the paintball gun and would go home to get it if the police were not summoned, defendant responded, "No, I don't remember saying that." Defense counsel's "misstates the testimony" objection was overruled.

Thereafter, the prosecutor asked defendant: "So when Mr. Haritonoff said that you told him that you were going to go home and bring the items to them - - and return the items if they wouldn't call the police, is he lying?" Defendant responded, "That conversation never happened, so, yes, he's lying." The prosecutor asked defendant, "Officer Robbins' testimony was that you told him that you entered into the apartment,

you stole the paintball gun, you went back home . . . to 278 to open up more packages, Officer Robbins would be lying?" Defendant denied that such a "conversation" occurred. Defense counsel's "misstates the testimony" objection was overruled. Finally, when defendant denied speaking to either Mr. Haritonoff or Officer Robbins, the prosecutor inquired, "So they're both lying?" Defendant responded, "Yes." The prosecutor followed with, "And you're telling us the truth?" Defendant said, "Yes."

During his closing argument, the prosecutor stated: "It's interesting that the defendant got on the stand and said everybody else lied. Viktor Haritonoff lied. Officer Robbins lied. And the only person that is telling the truth is him." Thereafter, defense counsel's "misstates the testimony" objection was overruled. The prosecutor continued: "So in order for the defendant's version of the story to be true, Viktor Haritonoff, Seth Buchwald, Officer Robbins, and Detective Valenzuela had to all lie and concoct in their story for the defendant's story to be true."

3. The prosecutor could properly ask the "were they lying" questions

In *People v. Chatman* (2006) 38 Cal.4th 344, 377-384, our Supreme Court addressed whether the "were they lying" line of questioning was misconduct or merely an admissibility of evidence issue. Our Supreme Court adopted the "in its context" standard and held: "[C]ourts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Id*. at p. 384; see also *People v. Tafoya* (2007) 42 Cal.4th 147, 178.)

In *People v. Hawthorne* (2009) 46 Cal.4th 67, 99, our Supreme Court held: "Unless precluded by statute, any evidence is admissible to attack the credibility of a witness if it has a tendency in reason to disprove the truthfulness of the witness's

testimony. [Citations.] Although a defendant cannot be compelled to be a witness against himself, if he takes the stand and denies the evidence presented against him, the permissible scope of cross-examination is '"very wide"' [Citation.]" (See also Evid. Code, § 780; *People v. Cooper* (1991) 53 Cal.3d 771, 822; *People v. Humiston* (1993) 20 Cal.App.4th 460, 479.) Our Supreme Court further held: "A prosecutor's suggestion or insinuation that the defense has been fabricated is misconduct only when there is no evidence to support such a claim. [Citation.]" (*People v. Hawthorne, supra,* 46 Cal.4th at p. 100, citing *People v. Earp* (1999) 20 Cal.4th 826, 862-863; *People v. Pinholster* (1992) 1 Cal.4th 865, 948.) In *Hawthorne*, the prosecutor asked if the arresting officer was lying while testifying regarding the facts related to the arrest. Citing to *People v. Chatman, supra,* 38 Cal.4th at pages 379-380, our Supreme Court found the "was he lying" question did not constitute misconduct. Our Supreme Court reasoned the defendant was a percipient witness to the events at issue and had personal knowledge regarding whether the other witnesses describing the same events were testifying truthfully. (*People v. Hawthorne, supra,* 46 Cal.4th at p. 98.)

We evaluate the prosecutorial misconduct claim in this context. The prosecutor's questions did not arise in a vacuum. Rather, the issue arose in the context of defendant's only defense at trial; namely, he entered the building only once believing it was a museum. In her opening statement, defense counsel, Ms. Zabala, stated that defendant went into the loft building thinking it was a museum when the door did not close all the way. Ms. Zabala said defendant saw the packages, opened them and took the contents to the laundromat. Ms. Zabala concluded that defendant did not have the specific intent to take anything when he entered the building. When defendant testified on his own behalf, his testimony was consistent with that scenario. When cross-examining defendant, the prosecutor, Janet Wu, inquired as to each witness's testimony where it conflicted with his. Defendant's testimony regarding what occurred differed significantly from that of Mr. Haritonoff and Officer Robbins. As to each of these witnesses, the prosecutor sought to clarify defendant's explanation by giving him the opportunity to explain the divergent testimony. The prosecutor did not try to elicit speculative testimony from defendant.

(See *People v. Hawthorne, supra,* 46 Cal.4th at p. 98; *People v. Chatman, supra,* 38 Cal.4th at p. 382.) Ms. Wu's questions sought to elicit testimony that would assist the jury in ascertaining whom to believe. (*People v. Tafoya, supra,* 42 Cal.4th at p. 179; *People v. Chatman, supra,* 38 Cal.4th at p. 383.)

4. Harmless error

In any event, to the extent that the questions were improper, any alleged error was harmless because it is not reasonably probable that a jury would have reached a more favorable result. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 243.) Mr. Haritonoff was expecting the delivery of Adidas clothing he had ordered. When the neighbor identified only as Xavier alerted Mr. Haritonoff to the fact that the package had been opened and the contents removed, they immediately went to the laundromat, where they found defendant in possession of the sportswear. Defendant admitted taking the clothing. When asked about the other package, defendant said he had taken it to his home but would go to his house and get it if they let him go. Mr. Haritonoff did not see a paintball gun with defendant. When questioned by Officer Robbins, defendant readily admitted going into the building and taking the items. Defendant said he took some of the items home and came back to get more from the apartment building. Defendant did not mention the fact that he thought the building was a museum when interviewed after his arrest. Even if the prosecutor had not asked the questions, it is not reasonably probable that a more favorable result would have been reached. (*People v. Melton* (1988) 44 Cal.3d 713, 744-745; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

5. Defendant was not denied effective assistance of counsel

Defendant's argument in the alternative that he was denied effective assistance of counsel because his attorney, Ms. Zabala, did not impose the proper objections to the line

of questioning is meritless. Because we have concluded that there was no prosecutorial misconduct, or that any error was not prejudicial, defendant's related claims of ineffective assistance of counsel fail. (*People v. Ledesma* (2006) 39 Cal.4th 641, 748; *People v. Chatman, supra,* 38 Cal.4th at p. 384.) Moreover, as our Supreme Court held: "[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal. (*People v. Mendoza Tello*[(1997)] 15 Cal.4th [264,] 266-267.) This is particularly true where, as here, the alleged incompetence stems from counsel's failure to object. '[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502; see also *People v. Dickey*[(2005)] 35 Cal.4th [884,] 914; *People v. Boyette* (2002) 29 Cal.4th 381, 433.)" (*People v. Lopez, supra,* 42 Cal.4th at p. 972.)

C. Sentencing

1. Presentence credits

As a result of the reversal of the section 667.5, subdivision (c)(21) finding, defendant is no longer limited to the award of presentence conduct credit of 15 percent pursuant to section 2933.1, subdivision (a). The failure to award a proper amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Defendant's presentence credits are corrected to include 177 actual days and 88 days of conduct credits for a total of 265 days pursuant to section 4019.

2. Court security fees

The trial court imposed four $20 section 1465.8, subdivision (a)(1) court security fees. However, the abstract of judgment reflects only one such fee. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The abstract of judgment should be corrected to accurately set forth the section 1465.8, subdivision (a)(1) court security fees orally imposed by the trial court. The trial court is to personally insure the abstract of judgment is corrected to full comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 110, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The finding as to count 1 that the burglary was a violent felony as defined by Penal Code section 667.5, subdivision (c)(21) is reversed. Defendant's presentence custody credits are modified to include 177 actual days and 88 days conduct credits. Upon remittitur issuance, the superior court clerk shall prepare a corrected abstract of judgment and forward it to the California Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

ARMSTRONG, J.

MOSK, J., Concurring

I agree that defendant should not prevail on his prosecutorial misconduct claim. I do not determine whether the objections to the questions should have been sustained. I also believe that the issue of ineffective assistance of counsel should be determined on habeas corpus.

MOSK, J.